

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

STEVEN C. ANDERSON
Claimant

VS.

H2 DRILLING

Respondent

AND

LIBERTY INSURANCE CORP.
Insurance Carrier

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Docket No. 1,040,827

ORDER

Claimant appeals the September 17, 2008, Order Denying Compensation (Order) of Administrative Law Judge Pamela J. Fuller (ALJ). Claimant was denied temporary total disability benefits as well as authorized medical treatment after the ALJ determined that claimant's injury did not arise out of and in the course of employment with respondent.

Claimant appeared by his attorney, Roger A. Riedmiller of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, John D. Jurcyk of Roeland Park, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held September 15, 2008, with attachments; the Deposition of Steven C. Anderson taken July 24, 2008; and the documents filed of record in this matter.

ISSUE

Whether claimant's accidental injury arose out of and in the course of employment with respondent.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the Order should be affirmed.

Claimant alleges that he suffered an accidental injury on May 19, 2008, when he was in an altercation with his driller. Claimant was hired on October 24, 2007, to work for respondent on its drilling rigs as a chain hand/motor man. On the date of the alleged accident, claimant was picked up by his driller, Mike Cavender, at claimant's house in Great Bend, Kansas. Claimant and two other workers were driven to Oakley, Kansas. Claimant had earlier advised Mr. Cavender that he needed to return to Great Bend that night as claimant had a final doctor's appointment for a finger injury he had suffered earlier, and also had a probation hearing that same day. Mr. Cavender agreed to drive claimant to Great Bend that night but was not willing to return two days later and drive claimant back to the rig site. This disagreement resulted in two arguments between claimant and Mr. Cavender. After the first argument that night, claimant went to the room of two co-workers. Claimant and Mr. Cavender were to share a different room. Mr. Cavender came to the co-workers' room and he and claimant again began arguing. At one point, claimant and Mr. Cavender exited the room. At that point, during claimant's testimony at the preliminary hearing, claimant's attorney advised claimant to not discuss any possible altercation that may have taken place outside the room.¹ Claimant complied, and there is nothing in this record to indicate what happened after claimant and Mr. Cavender left the room.

The record is clear that claimant has a broken right wrist and a sprained left knee, but how those injuries occurred is not in this record. Numerous questions were put to claimant regarding the particulars surrounding an alleged accident and injury claim, but claimant consistently refused, upon advice of counsel, to answer those questions.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.²

¹ P.H. Trans. at 25.

² K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.³

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁴

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."⁵

It is claimant's burden to prove that an accident occurred, and that that accident arose out of and in the course of his employment. It is difficult to determine that an accident occurred when claimant refuses to testify about the incident alleged. This record proves that claimant and his driller, Mr. Cavender, argued about the return trip from Great Bend after claimant was to be examined for his earlier suffered finger injury, and after claimant attended his probation hearing. But information after that point stops. Claimant suffered injuries but the cause of those injuries is not in this record. Thus, it is determined that claimant has failed to prove that he suffered an accident which arose out of and in the course of his employment with respondent. The denial of benefits by the ALJ is, therefore, affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

³ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁴ K.S.A. 2007 Supp. 44-501(a).

⁵ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

⁶ K.S.A. 44-534a.

as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to satisfy his burden of proof that he suffered an accident which arose out of and in the course of his employment with respondent.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order Denying Compensation of Administrative Law Judge Pamela J. Fuller dated September 17, 2008, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November, 2008.

HONORABLE GARY M. KORTE

c: Roger A. Riedmiller, Attorney for Claimant
John D. Jurcyk, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge